RECENT DEVELOPMENTS

Koons Ford of Baltimore, Inc. v. Lobach[*]

I. INTRODUCTION

In *Koons Ford of Baltimore, Inc. v. Lobach*, Maryland's highest court was asked to use the tools of statutory interpretation to decide which of two federal acts, the Federal Arbitration Act (FAA) or the Magnuson–Moss Warranty Act (MMWA), is to prevail when the two acts come into direct conflict.[1] Numerous state and federal courts throughout the United States that have been asked this question have come to opposite conclusions, resulting in a sharp jurisdictional split.[2] The issue of which act predominates is particularly difficult because there are strong public policy arguments in support of each federal act: wanting to preserve the terms of bargained–for contracts that include arbitration agreements for the FAA, and wanting to protect the rights of less informed buyers against more educated sellers for the MMWA.[3] With its decision in *Koons Ford*, Maryland's highest court joined the minority of jurisdictions that have held that the MMWA trumps the FAA.[4]

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[*] Koons Ford of Balt., Inc. v. Lobach, 919 A.2d 722 (Md. 2007).

[1] *See id.* at 723–24.

[2] *See id.* at 732–34. The majority of jurisdictions including the Fifth Circuit and the Eleventh Circuit; federal district courts in Alabama, Arizona, and Michigan; and the highest state courts in Alabama, Illinois, Michigan, and Texas have held that the FAA should predominate. *See* Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470 (5th Cir. 2002); Davis v. S. Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002); Patriot Mfg. v. Dixon, 399 F. Supp. 2d 1298 (S.D. Ala. 2005); Dombrowski v. Gen. Motors Corp., 318 F. Supp. 2d 850 (D. Ariz. 2004); Pack v. Damon Corp., 320 F. Supp. 2d 545 (E.D. Mich. 2004); Patriot Mfg. v. Jackson, 929 So. 2d 997 (Ala. 2005); Borowiec v. Gateway 2000, Inc., 209 Ill. 2d 376 (Ill. 2004); Abela v. Gen. Motors Corp., 469 Mich. 603 (Mich. 2004); *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480 (Tex. 2001). District courts in Ohio and Virginia have held that the MMWA should predominate. *See* Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910 (N.D. Ohio 2003); Browne v. Kline Tysons Imps., Inc., 190 F. Supp. 2d 827 (E.D. Va. 2002); Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958 (W.D. Va. 2000).

[3] *See* Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: The Quintessential* Chevron *Case*, 16 LOY. CONSUMER L. REV. 1, 1–2 (2003).

[4] *See Koons Ford of Balt., Inc.*, 919 A.2d at 723–24.

II. FACTUAL AND PROCEDURAL HISTORY

On October 20, 2001, William Lobach purchased a 2001 Ford Escort from the Koons Ford dealership in Baltimore, Maryland.[5] William's father, Raymond Lobach, co-signed for the car.[6] Both William and Raymond signed each side of a double-sided buyer's order.[7] The reverse side of the buyer's order included a binding arbitration provision.[8] Specifically, this provision stated that all claims relating to the car would be resolved through binding arbitration and that the agreement would be governed by the FAA.[9]

On April 20, 2005, Raymond Lobach filed a complaint against Koons Ford in the Circuit Court for Baltimore County.[10] Lobach's complaint contained six counts against Koons Ford, including a MMWA claim,[11] and alleged that Koons Ford failed to disclose defects and prior damage to the car.[12] On June 3, 2005, Koons Ford filed a petition with the circuit court to stay the case so that claims could be arbitrated pursuant to the buyer's order.[13] The circuit court denied this petition on August 26, 2005.[14] Koons Ford filed an amended petition requesting the same relief as the original petition on September 26, 2005.[15] The circuit court granted Koons Ford's amended petition on all counts except for the MMWA claim on March 10, 2006.[16]

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[5] *Id.* at 724.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Koons Ford of Balt., Inc.*, 919 A.2d at 724.

[11] *Id.* at 724–25. Lobach alleged that Koons Ford violated the MMWA by selling the car in violation of implied and express warranties of merchantability and fitness. Facts used to support this claim included: (1) both a sales representative and a finance representative stated that the car did not have any prior damage; (2) the Used Vehicle Disclosure Form stated that the car had never been used commercially; (3) a diagnostic evaluation of the car revealed that it had prior accident damage; (4) a service technician stated that the odometer had been rolled back and that the car had mechanical problems; and (5) the car had prior commercial use as a lease and rental vehicle. *Id.* at 724 n.2.

[12] *Id.*

[13] *Id.* at 725.

[14] *Id.*

[15] *Koons Ford of Balt., Inc.*, 919 A.2d at 725.

[16] *Id.* In granting this amended petition, the circuit court necessarily concluded that binding arbitration pursuant to the signed buyer's order was appropriate for the state law statutory, contractual, and fraud claims. *See id.*

On April 10, 2006, Koons Ford filed an appeal with the Court of Special Appeals, the state of Maryland's intermediate appellate court.[17] While this appeal was still pending, the Maryland Court of Appeals, the highest court in the state, accepted the *Koons Ford* case by issuing a writ of certiorari on its own motion on September 13, 2006.[18] Though *Koons Ford* presented two questions on appeal and Lobach presented six questions on appeal, the primary issue before the Maryland Court of Appeals was whether MMWA claims should be subject to binding arbitration in light of a contractual agreement between the parties.[19]

III. THE COURT'S HOLDING AND REASONING

The Maryland Court of Appeals held that claimants cannot be forced to resolve their MMWA claims through binding arbitration.[20] In so holding, this court concluded that "Congress expressed an intent to preclude binding arbitration when it enacted the MMWA."[21] Five judges signed the majority opinion and two judges dissented.[22]

A. *The FAA and the MMWA*

In 1925, the FAA[23] was enacted with the purpose of "mak[ing] valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts [and other listed categories of transactions]."[24] Specifically, the FAA states that written arbitration provisions included in certain types of transactions, including commercial contracts, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[25]

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[17] *Id.*

[18] *Id.* at 725–26.

[19] *See id.* at 725 n.5.

[20] *Koons Ford of Balt., Inc.*, 919 A.2d at 723.

[21] *Id.* at 723–24.

[22] *Id.* at 722. The brief, straightforward dissent written by Judge Harrell and joined by Judge Raker cites a large number of cases that have held that the FAA should predominate and asserts that the majority decision is "completely out-of-step with both Congress' and the U.S. Supreme Court's views regarding arbitration not being inherently hostile to consumers' interests." *Id.* at 738 (Harrel, J., dissenting).

[23] *See* 9 U.S.C. § 1, et. seq. (2000).

[24] United States Arbitration Act, Pub. L. No. 68–401, 43 Stat. 883 (1925).

[25] 9 U.S.C. § 2 (2000).

Between the time of its enactment and the 1980s, the FAA was not generally applied to statutory claims.[26] In the 1980s, the Supreme Court changed its public policy to favor compelled arbitration, stating that "we [must] rigorously enforce agreements to arbitrate . . . at least absent a countervailing policy manifested in another federal statute."[27] This strong public policy in favor of arbitration has further evolved to the point that "even claims arising under a statute designed to further important social policies may be arbitrated 'so long as the prospective litigant effectively may vindicate his statutory cause of action in the arbitral forum.'"[28]

Fifty years later, in 1975, Congress enacted the MMWA[29] with a stated statutory purpose of "provid[ing] minimum disclosure standards for written consumer product warranties; . . . defin[ing] minimum Federal content standards for such warranties; . . . amend[ing] the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes."[30] To promote these purposes, the MMWA provides a private right of action to consumers who are "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract."[31]

The MMWA discusses "informal dispute settlement procedures" as a means of encouraging settlement,[32] but Congress never explicitly defined the term "informal dispute settlement procedures."[33] Rather, Congress delegated power to the Federal Trade Commission (FTC) to "devise minimum requirements for any informal dispute settlement procedure incorporated into the written warranty."[34] In the regulations it drafted, the FTC chose the term "Mechanism" to describe the "informal dispute settlement procedure[s]" discussed in the MMWA,[35] and stated that "[d]ecisions of the Mechanism shall not be legally binding on any person."[36]

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[26] *Koons Ford of Balt., Inc.*, 919 A.2d at 729.

[27] *Id.* (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

[28] *Koons Ford of Balt., Inc.*, 919 A.2d at 730 (quoting Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000)).

[29] *See* 15 U.S.C. § 2301, et. seq. (2000).

[30] Magnuson-Moss Warranty Act, Pub. L. No. 93–637, 88 Stat. 2183 (1975).

[31] 15 U.S.C. § 2310(d)(1) (2000).

[32] 15 U.S.C. § 2310(a) (2000).

[33] *Koons Ford of Balt., Inc.*, 919 A.2d at 731.

[34] *Id.*

[35] 16 C.F.R. § 703.1(e) (2007).

[36] 16 C.F.R. § 703.5(j) (2007).

B. *Statutory Interpretation*

In *Koons Ford*, the Maryland Court of Appeals examined two different statutory interpretation tests that have previously been used by other jurisdictions to decide the issue of whether the FAA or the MMWA should predominate: the *McMahon* test and the *Chevron* test.[37] The test used to determine whether a statute's purpose conflicts with the strong federal public policy favoring arbitration is found in *Shearson/American Express, Inc. v. McMahon*.[38] Under the *McMahon* test, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude [application of the FAA by demonstrating an intent discernable] . . . from [the statute's] text or legislative history, . . . or from an inherent conflict between arbitration and the statute's underlying purposes."[39]

Because Congress did not define the term "informal dispute settlement procedure" within the MMWA, but rather delegated the authority to define that term to the FTC, the test found in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* governing regulations drafted by administrative agencies has also been applied by courts deciding this issue.[40] The *Chevron* test is a two-pronged test which first asks "whether Congress has directly spoken to the precise question at issue,"[41] and if it is determined that Congress has not so spoken, then asks "whether the agency's answer is based on a permissible construction of the statute."[42]

After discussing how other jurisdictions have resolved the issue,[43] the *Koons Ford* court started its analysis by looking to the plain language of the text of the MMWA in an attempt to determine congressional intent.[44] This court concluded that the plain language of the MMWA indicates a clear congressional intent to preclude the enforcement of binding arbitration

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[37] *Koons Ford of Balt., Inc.*, 919 A.2d at 732–34.

[38] *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987).

[39] *Id.*

[40] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[41] *Id.* at 842.

[42] *Id.* at 843.

[43] *Koons Ford of Balt., Inc.*, 919 A.2d at 733–36. This court specifically discussed the Fifth Circuit decision in *Walton*, 298 F.3d at 470; the Eleventh Circuit decision in *Davis*, 305 F.3d at 1268; the Northern District of Ohio decision in *Rickard*, 279 F. Supp. 2d at 910; and the Eastern District of Virginia decision in *Browne*, 190 F. Supp. 2d at 827. *Id.*

[44] *Id.* at 735.

clauses.[45] Even though Congress did not specifically discuss binding arbitration in the MMWA, this court determined that the lack of mention does not mean that Congress failed to speak to the issue, because binding arbitration was not as common and the FAA was not as widely applicable in 1975 when the MMWA was passed as it is today.[46]

The *Koons Ford* court next looked to the legislative history of the MMWA, reasoning that both the House Report[47] and the Senate Conference Committee Report[48] reveal "the congressional intent to prevent consumers from being forced into binding arbitration because such a resolution would constitute a substitute for litigation."[49] Further, because the MMWA was enacted with a pro-consumer purpose and was enacted before the expansion of the FAA to statutory claims, this court concluded that the House Report and the Senate Conference Committee Report comprise clear evidence of a congressional intent to protect consumers from being forced to resolve their claims through binding arbitration.[50] This court concluded by asserting that to interpret the legislative history of the MMWA to permit binding arbitration would be inconsistent with common sense, and that if Congress intended the alternate interpretation, it could have said so explicitly.[51]

After examining the plain language and the legislative history of the MMWA, the Maryland Court of Appeals applied the *Chevron* test.[52] Having previously concluded that the first prong of *Chevron* was met,[53] this court then analyzed whether the FTC's interpretation was based on a permissible construction of the MMWA.[54] This court held that the second prong of *Chevron* was met "for all of the reasons set forth *supra*, describing why this Court believes that Congress evinced such an intent."[55] Furthermore, this court stated that the FTC clarification that binding arbitration is not an "informal dispute settlement procedure" was based on the plain language of the MMWA in 1999 when it stated "[a]lthough several industry representatives at that time [1975] had recommended that the Rule allow

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[45] *Id.*

[46] *Id.* at 735 n.10.

[47] H.R. REP. NO. 93–1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702.

[48] S. CONF. REP. NO. 93–1408 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7755.

[49] *Koons Ford of Balt., Inc.*, 919 A.2d at 736.

[50] *Id.*

[51] *Id.* at 737.

[52] *Id.*

[53] *See id.* at 735.

[54] *Id.* at 737.

[55] *Koons Ford of Balt., Inc.*, 919 A.2d at 737.

warrantors to require consumers to submit to binding arbitration, the [FTC] rejected that view as being contrary to the congressional intent."[56]

Although courts in other jurisdictions that have decided this issue have implicated the *McMahon* test, the Maryland Court of Appeals held that the *McMahon* test does not apply because neither *McMahon* nor the cases that expanded the application of the FAA had been decided when the MMWA was enacted in 1975.[57] By dismissing the *McMahon* test as inapplicable, this court distinguished the majority of cases from other jurisdictions that have held that the FAA prevails over the MMWA.[58]

IV. THE IMPACT OF THE COURT'S RULING

The Maryland Court of Appeals' decision in *Koons Ford of Baltimore, Inc. v. Lobach* served to further deepen the jurisdictional split between state and federal courts that have decided the issue of whether MMWA claims can be forced into binding arbitration.[59] Until the United States Supreme Court addresses this issue, the existing circuit split is likely to become even more profound as more and more courts throughout the country are faced with this difficult statutory interpretation question.[60] In addition to resolving the circuit split, the Supreme Court should choose to accept this issue when it first gets the opportunity to do so because of its broader policy implications of whether the liberal public policy of favoring arbitration agreements can ever be overcome by countervailing concerns.[61]

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[56] *Id.* at 737 n.11 (quoting 64 Fed. Reg. 19700, 19708 (Apr. 22, 1999)).

[57] *Koons Ford of Balt., Inc.*, 919 A.2d at 735 n.10.

[58] *Id.* at 735.

[59] *See* Justin Kelly, *Court Rules No Binding Arbitration Under Magnuson-Moss*, ADRWorld.com, Mar. 27, 2007, http://www.adrworld.com.

[60] *See* Lloyd, *supra* note 3, at 3.

[61] *See id.* at 34–35.